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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2008

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.17 of 2001

M.Palani

.. Appellant / Defendant

-vs-

1.Muniammal

2.Mallika

3.kanchana

.. Respondent/Plaintiffs

Prayer:- This Appeal has been filed under Section 96 of CPC against the decree and judgment dated 15.02.2000 in O.S.No.5497 of 1996 on the file of the XI Assistant Judge, City Civil Court, Madras.

For appellant : Mr.B.Divakaran, Advocate

For respondents : Mr.B.K.Sreenivasan, Advocate

JUDGMENT

This appeal has been directed against the decree and judgment in O.S.No.5497 of 1996 on the file of the XI Assistant Judge, City Civil Court, Chennai. The lis is between the wife (1st plaintiff) and daughters (2nd & 3rd plaintiffs) of one Mari Naicker and Mari Naicker's son Palani. The suit is for partition of plaintiff's $\frac{3}{4}$ share in the plaint schedule property, which according to the plaintiff, was purchased by the first plaintiff's husband Mari Naicker under a sale deed dated 30.11.1973 from the Hereditary Trustee of Agastheeswarar Prassanna Venkatesaperumal Deveasthanam. Even though the said sale deed, which was registered under Document No.1862 of 1973 before the Sub-Registrar's Office, T Nagar, the same was not produced before the trial Court. But as per the directions of this Court, a copy of the said sale deed was produced by the learned counsel for the plaintiffs today, which is marked as Ex.C.1.

2.The averments in the plaint in brief are as follows:-

The plaint schedule property bearing Door No.8 (Old No.7) Abbu Naicken Street, Nungambakkam, Chennai-34, is the self-acquired property of late Mari Naicker, the husband of the first plaintiff and father of the plaintiffs 2 & 3 and the defendant. He having put up the superstructure on the land belonging to the Agastheeswarar Prassanna Venkatesaperumal Deveasthanam, which was taken on lease by him and later acquired by him under the sale deed



dated 30.11.1973 registered under Document No.1862 of 1973 of the T Nagar Sub-Registrar's Office, out of which an extent of 231 sq ft has been gifted to a relative of the said Mari Naicker, who died intestate on 30.5.1985 leaving behind the plaintiffs and defendants as his heirs. The plaintiffs are each entitled to 1/4th share in the plaint schedule property and the defendant is entitled to the remaining 1/4th share. Eversince the death of the said Mari Naicker the plaintiffs are residing in the suit property and the defendant has been managing the suit property by collecting the rent from the tenants paying the tax and public charges. The defendant was paying the plaintiffs' due share in the rental income for some time, but subsequently failed to pay the same to the plaintiffs. The plaintiffs issued registered legal notice dated 8.9.1993 through their lawyer to the defendant calling upon him to render them true and proper accounts in respect of the rental collection made by him from the suit property and to pay them their due share in the rental income derived from the suit property. The defendant has failed to send any reply to the said legal notice. Hence, the suit for partition of plaintiffs' 3/4th share in the plaint schedule property.

3.The defendant has filed written statement contending that the his father Mari Naicker was a tenant in a portion of the land belonging to the Agastheeswarar Prassanna Venkatesaperumal Deveasthanam and that he was residing in the said land and put up a hut therein and to meet the said expenses Mari Naicker, father of the defendant, had borrowed money from the third parties. The first plaintiff eloped with one Sambandham on 8.4.1979 and the father of the defendant gave a police complaint. Thereafter, the whereabouts of the first plaintiff was not known. Long after the death of the father of the defendant, the first plaintiff came to Madras and she claimed the retirement benefits of Mari Naicker. The first plaintiff had collected all the retirement benefits and she is also getting family pension. The father of the defendant had borrowed heavy loan from various persons to meet the marriage expenses of Malliga, one of the sisters of the defendant. He had also entered into a sale agreement to sell the plaint schedule property and a suit for specific performance is also pending. One Mr.Mohammed Yacoob filed a suit against the plaintiffs and this defendant in O.S.No.9396 of 1987 before this Court and the said suit was decreed. To avoid the execution this defendant has paid Rs.12,000/- and settled the issue. The defendant has also spent Rs.5,000/- to maintain the hut and has also developed the property out of his own funds to the tune of Rs.60,000/-. Since Mari Naicker had no money and he was indebted to several persons he could not improve the property. At the time of death of Mari Naicker, he had borrowed money to the tune of Rs.50,000/-. The said loan was cleared by this defendant. From the construction made by Mari Naicker he was getting a meagre rental income of Rs.2,000/- from 1997 and previously the rental income was only below Rs.1,000/-. The entire construction expenses was met by this defendant. The plaintiffs are not entitled to any share in the plaint schedule property. The 3rd plaintiff had eloped with a married man and she is now living with him as his mistress. The



entire retirement benefit of Mari Naicker was taken by the first plaintiff, even though she is not entitled to the same, since she had eloped with another person even during the life time of Mari Naicker. This defendant has to pay the entire amount in O.S.No.5387 of 1987 and the plaintiffs have not paid any share for the discharge of the said decree amount. The plaintiffs are not residing in the suit property. The superstructure was constructed by this defendant and he had let out the premises and as such the plaintiffs were not collecting any rent as alleged. A suitable reply was given by this defendant to the notice sent by the plaintiffs. The plaintiffs have no cause of action to file this suit. The suit was not properly valued for the purpose of Court fee and jurisdiction. The plaintiffs are not entitled to the relief asked for in the plaint. Hence, the suit is liable to be dismissed with costs.

4.On the above pleadings the learned trial Judge has framed four issues for trial. Before the trial Court the first plaintiff has examined herself as P.W.1 and exhibited Ex.A.1 to Ex.A.3. The defendant has examined himself as D.W.1 and marked Ex.B.1 to Ex.B.7. After scanning the evidence both oral and documentary the learned trial Judge has come to the conclusion that the plaintiffs are entitled to a preliminary decree for partition of their 3/4th share in the plaint schedule property and accordingly decreed the suit. Aggrieved by the findings of the learned trial Judge, the defendant has preferred this appeal.

5.Now the points for determination in this appeal are as follows:-

1)Whether the suit for partition of plaintiffs' 3/4th share in the plaint schedule property is sustainable in lieu of the settlement of the decree amount in O.S.No.9396 of 1987 by the defendant and also the improvements made in the plaint schedule property by the defendant from out of his own income?

2)Whether the decree and judgment of the learned trial Judge in O.S.No.5487 of 1996 on the file of the XI Assistant Judge, City Civil Court, Chennai, is liable to be set aside for the reasons stated in the memorandum of appeal?

6.Point No.1:- Admittedly the husband of the first plaintiff and the father of the plaintiffs 2 & 3 and the defendant had purchased the plaint schedule property under Ex.C.1-sale deed dated 30.11.1973 from the trustees of Agastheeswarar Prassanna Venkatesaperumal Deveasthanam, Nungambakkam. According to the 1st plaintiff (P.W.1), after the purchase of the plaint schedule property by her husband Mari Naicker, he had put up a titled house in the plaint schedule property and that her husband died intestate on 30.5.1985 and that there was eight tenant in the plaint schedule property and the defendant was collecting the entire rent from the said tenants and that under Ex.A.1 show had demanded partition of the plaintiffs' 3/4th share in the plaint schedule property and even after the receipt of the suit notice under Ex.A.2-



acknowledgment the defendant has not chosen to send any reply. She has also produced Ex.A.3 to show that the sale consideration under Ex.C.1 was paid by her husband Mari Naicker. Even under the plaint, the plaintiffs would admit that Mari Naicker had sold about 231 sq ft from out of 1 ground and 564 sq.ft purchased under Ex.C.1 and has also scheduled to the plaint only 1 ground and 333 sq.ft with four boundaries. The defendant would contend that even during the life time of his father Mari Naicker, the first plaintiff has eloped with one Sambandham and that his father Mari Naicker had preferred a complain under Ex.B.1 and Ex.B.2 and hence, he would contend that the first plaintiff is not entitled to any share in the plaint schedule property since she had already left the matrimonial home of Mari Naicker and that for more than seven years her whereabouts were not known and she is to be presumed to be dead under civil law. Even though on the side of the defendant Ex.B.1 and Ex.B.2 - complaints were filed, there is absolutely no material placed before the trial Court to show that those complaints were actually preferred by Mari Naicker with the police. There is no FIR marked or no acknowledgment marked to show that the complaints under Ex.B.1 & Ex.B.2 were preferred with police. Ex.B.3-letter was addressed to one Susila, but the addressee under Ex.B.3 viz. Susila was not examined. It is not known how the defendant got Ex.B.3 from the said Susila. Ex.B.6 was produced on the side of the defendant to show that even in the year 1983 Mari Naicker had treated his wife Muniammal as dead. But it is seen from Ex.B.4 that one Mahammed Yacoob had filed a civil suit in the year 1987 against the said Muniammal, the present defendant and Malliga, the second plaintiff herein, claiming the debt amount of Rs.5,000/- borrowed by Mari Naicker. If Muniammal was dead in the year 1983 or her whereabouts were not known for more than seven years, then there is no possibility for filing a suit against her in the year 1987 by one Mohammed Yacoob and got a decree against her and the other legal representatives of the deceased Mari Naicker. So, the contention of the defendant that the defendant had suffered debt cannot be sustainable.

6(a)The other limb of argument advanced on behalf of the defendant is that he had paid the decree amount in O.S.No.9396 of 1987 to the decree holder and obtained Ex.B.5-receipt. The learned trial Judge has relegated the question of mesne profits to a separate proceedings under Order 20 Rule 12 of CPC. So, it is open to the defendant to raise all those defence in the said proceedings. So, absolutely there is no material produced before this Court to warrant any interference with the findings of the learned trial Judge in O.S.No.5497 of 1996, which is neither illegal nor infirm. Hence, I hold on Point No.1 that the suit for plaintiffs' 3/4th share in the plaint schedule property is maintainable and the plaintiffs' claim for having discharged the family debt is a matter to be decided in the separate proceedings under Order 20 Rule 12 of CPC.

7.Point No.2 :- In view of my findings in the earlier paragraphs I hold on Point No.2 that the decree and judgment or the learned trial Judge in O.S.No.5497 of 1996 on the file of the XI



Assistant Judge, City Civil Court, Chennai, need not be set aside for the reasons stated in the memorandum of appeal.

8. In fine, the appeal fails and the same is hereby dismissed confirming the decree and judgment in O.S.No.5497 of 1996 on the file of the XI Assistant Judge, City Civil Court, Chennai. No costs.

Exhibit Mark through Court:-

Ex.C.-1 - Registration copy of the sale deed dated 30.11.1973

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

SSV

To,

1.The Registrar, City Civil Court, Chennai.

2.The Section Officer,

V.R.Section. High Court, Madras.

1 cc To Mr.B.Kaalathinathan, Advocate, SR.53448

1 cc To Mr.B.Divakaran, Advocate, SR.53348

A.S.No.17 of 2001

KM(CO)
SRA(24/10/2008)